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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DORA AGUADO et al., Plaintiffs and Respondents, v. JORGE FRANCO et al., Defendants and Appellants.	B287753 (Los Angeles County Super. Ct. No. BC594098)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teresa Beaudet, Judge. Affirmed.

Rogers & Harris and Michael Harris for Plaintiffs and Respondents.

Sevag Nigoghosian for Defendants and Appellants.

Jorge Franco and Yohana P. Mendoza (together, Appellants) appeal from a judgment ordering specific performance of a contract following a bench trial. Respondents Louis and Dora Aguado (the Aguados) sued to compel performance of a handwritten agreement concerning a change in ownership of a house that they had previously sold to Franco. The trial court ordered specific performance of the contract, rejecting Appellants' arguments that Franco's English was not good enough to understand the contract and that the Aguados waited too long to enforce it. Appellants make various arguments concerning the formation and enforceability of the contract that they did not present at trial. We reject those arguments and affirm.

BACKGROUND

1. The Residence

Franco was married to Louis Aguado's sister, Esther, who passed away in 2009.

In 1981 the Aguados purchased a house in Huntington Park (the Residence) for $60,000. In July 1990, they refinanced the Residence, resulting in a mortgage in the amount of $124,000.

Later in 1990 Louis Aguado made an oral agreement with Franco and Esther to sell them the Residence. Pursuant to that agreement, Franco and Esther were to pay the Aguados $10,000 and were to refinance the Residence so that the mortgage was no longer under the Aguados's name.

In accordance with their oral agreement, Louis provided Franco and Esther a quitclaim deed to the Residence in 1993. In 2007 Dora also provided Franco and Esther a quitclaim deed transferring her interest in the Residence. She did so reluctantly because Franco and Esther had paid only $8,000 of the $10,000

that they had agreed to pay the Aguados and had not yet refinanced the Residence.

Franco and Esther never obtained a new mortgage on the Residence as they had promised to do. At some point Franco and Esther fell behind in the mortgage payments on the Residence. This injured the Aguados's credit, as the mortgage was still in their name.

To deal with this problem, Louis and his brother gave Franco money to get the Residence out of foreclosure. They also helped remodel the Residence, adding a bathroom so that Franco and Esther could rent out part of the Residence to provide money for the mortgage payments.

Beginning in about 2011, Franco repeatedly suggested to Louis that Louis pay off the mortgage on the Residence in return for a 50 percent ownership interest. Louis was reluctant until he noticed that Franco's health was failing. Franco made the mortgage payments in person at the bank, which was about five miles away from the Residence. Franco finally lost his ability to drive, and Louis became concerned that Franco would be unable to pay the mortgage. Louis therefore agreed to Franco's proposal.

2. The Agreement

On October 5, 2013, the Aguados and Franco went to the offices of a notary to put the agreement in writing. Louis expected that the notary would write out the agreement for them, but the notary told them he could only notarize the document, not write it. The Aguados and Franco therefore got together in the notary's office and Louis wrote out an agreement in English in his handwriting (the Agreement), which the notary then notarized.

The Agreement begins by identifying the Aguados by name and address, and states that "[b]y this document we declare the

following." This introductory comment is followed by five separately numbered provisions.

The numbered provisions state that: (1) the Aguados will pay off the mortgage on the Residence and "upon doing so" will become "1/2 owners of the property"; (2) Franco has the right to live in the Residence for "the rest of his life or until he solely [*sic*] able to"; (3) upon Franco's death the Aguados "will become sole owner[s]"; (4) "this contract will dissolve any previous wills or testaments;" and (5) any rent from the Residence "will be equally divided" between the Aguados and Franco. Each party signed the Agreement.

After the Agreement was executed, the Aguados paid off the remaining $77,226.85 mortgage amount on the Residence. For about two years after the Agreement was executed the Aguados also received $400 per month from Franco as their portion of the rent paid on the Residence.

3. Franco's Marriage

Franco married Mendoza on August 5, 2015, several years after the Agreement was executed. At the time, Franco was 80 or 81 years old and Mendoza was 27.

The Aguados learned about the marriage about 10 days before Labor Day in 2015. The Aguados met with Franco and Mendoza in a park, where Franco explained that he and Mendoza had a "marriage arrangement." Franco wanted Mendoza to take care of him "and in return, he was going to clear her immigration status." Franco said that he wanted Louis to permit Mendoza to continue to live in the Residence for about two years after Franco died. Louis did not "shut down the idea," and they agreed to meet again the next week.

Franco and Mendoza did not show up for the meeting, so the Aguados went to the Residence to find them. Louis testified

that Mendoza did not permit him to speak with Franco, and she ultimately called the police with a false complaint that Louis was harassing them.

The Aguados filed their complaint against Franco and Mendoza for specific performance of the Agreement on September 9, 2015. After hiring counsel, the Aguados learned that Franco had executed a grant deed dated August 8, 2015. The deed purported to transfer record title in the Residence to Franco and Mendoza.

4. Trial

The case was tried to the court in September 2017. Appellants argued that: (1) Franco did not understand the Agreement because it was written in English and he speaks only Spanish; and (2) the Aguados's claims were barred on equitable grounds because they waited too long to enforce their rights.

The trial court found against Appellants in a detailed, eight-page written decision. The trial court noted that, "[a]t trial, Defendants did not put on any evidence to contest the existence or terms of the Agreement or any of the facts and circumstances leading up to the Agreement; they contested only whether Franco had the ability to enter into the Agreement because he did not read or understand English." The court rejected that claim, citing the testimony of the notary, who before notarizing the Agreement asked Franco about three times in Spanish whether Franco understood the Agreement and Franco said yes. The trial court also cited testimony by Mendoza in which she admitted that "Franco never signed anything he did not have explained to him," and that this was true in 2015 when Franco signed the grant deed purporting to transfer the Residence to him and Mendoza.

With respect to Appellants' unreasonable delay argument, the trial court noted that the Aguados filed their lawsuit within a

month after learning of the deed to Mendoza. The trial court also concluded that the defense of laches did not apply because the Aguados filed the lawsuit well within the four-year period permitted under the applicable statute of limitations.

The trial court entered a judgment ordering specific performance of the Agreement. Specifically, the judgment ordered that: (1) the Aguados "have a present one-half ownership" in the Residence; (2) Franco has "a life estate with the right of exclusive occupancy" of the Residence; (3) upon Franco's death the ownership of the Residence "will be entirely and solely that of" the Aguados; (4) rents from the Residence, if any, during Franco's lifetime "will be divided equally between Dora and Louis Aguado, on the one hand, and Jorge Franco, on the other hand"; and (5) the grant deed purporting to give an ownership interest in the Residence to Mendoza "shall be valid only to the extent of Jorge Franco's remaining interest in the [Residence] and shall not impair the right, title or interest of Dora and Louis Aguado pursuant to their rights in the [Residence] as set forth herein."

DISCUSSION

1. Appellants Have Provided No Reason to Conclude that the Parties Failed to Form a Contract

Appellants argue that the parties did not intend the Agreement to be a contract. However, Appellants acknowledge that they "did not bring up the issue of whether or not the agreement was an enforceable contract at trial." This fact severely constrains their ability to challenge the existence of a contract on appeal.

It is "solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62

Cal.2d 861, 865.) Thus, an appellate court independently interprets the meaning of a written contract when the interpretation does not depend upon consideration of conflicting evidence. (*Id.* at pp. 865–866.) That same principle applies to interpretation of a document to determine if a contract was actually formed. (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 556.)

Because the interpretation of a written instrument is a question of law, an appellate court may consider new arguments on appeal concerning the meaning of the instrument if those arguments are limited to the language of the document itself. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [appellate court may consider an issue for the first time if it is a pure question of law presented on undisputed facts].) However, if an argument concerning the meaning of the document depends upon evidence outside the four corners of the document itself, the argument must first be presented in the trial court so that the relevant facts may be determined. (*Harriman v. Tetik* (1961) 56 Cal.2d 805, 810 [mixed question of fact and law concerning contract formation must first be raised in the trial court].)

Even language that seems clear on its face may not present a pure question of law. Language that is not obviously ambiguous may still be subject to interpretation based upon extrinsic evidence demonstrating that an ambiguity exists. "The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39.) Thus, "[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the

offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Id.* at p. 37.)

In light of these principles, there is no basis for this court to conclude that the parties failed to form a contract.

a. *The contents of the Agreement suggest that it is a contract*

On its face, the Agreement assigns rights and obligations concerning a change in ownership of the Residence. It states that the Aguados will pay off the mortgage on the Residence, and "upon doing so" will receive certain ownership rights. It also reserves to Franco the right to live in the property for the rest of his life. Such an exchange of promises concerning compensation for performing something of value (i.e., paying off the mortgage) suggests an intent to create a contract. (See Civ. Code, § 1549 [a contract is "an agreement to do or not to do a certain thing"].)

The contents of the Agreement also show that it covered all the material terms for the sale of a property interest. Those terms include " 'the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified.' " (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 349 (*Patel*), quoting *King v. Stanley* (1948) 32 Cal.2d 584, 588–589 (*King*).)

In this case, the seller was Franco; the buyers were the Aguados; and the price was the cost of paying off the existing mortgage. The property at issue was the identified property interest in the Residence—i.e., a one-half ownership interest in the Residence that the Aguados were to receive upon paying off the mortgage and the right to sole ownership upon Franco's death. Although the Agreement did not include details concerning the specific "time and manner" of the mortgage

payment, responsibility for the payment was clearly assigned to the Aguados and the transfer of ownership interests was contingent on that payment. (See *Patel*, *supra*, 45 Cal.4th at p. 350, fn. 2 ["the manner of payment, like the time of payment, is a matter that may be determined by reference to custom and reason when the contract is silent on the question"].) The presence of all material terms in the Agreement suggests that it was a contract, as does the fact that all parties executed it. (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 943 (*Meyer*).)

Appellants offer various reasons why the Agreement on its face does not constitute a contract. None of those reasons is persuasive.

Appellants argue that the language at the beginning of the Agreement stating that the Aguados "declare the following" means that the document was "nothing but a declaration of the proposed actions of plaintiffs without . . . Franco agreeing to anything." That argument is unpersuasive for several reasons.

First, in another location the Agreement states that it is a "contract." Second, its contents are inconsistent with a mere declaration. The Agreement does not simply describe what the Aguados want; it also describes what Franco is to give up. It provides that Franco will surrender half of his ownership interest in the Residence during his lifetime and all of his ownership rights upon his death. As discussed above, the presence of all the material terms for the sale of a property interest suggest a contract. Third, as mentioned, the presence of Franco's signature supports the conclusion that the Agreement created bilateral obligations. At a minimum, these aspects of the Agreement preclude us from holding as a matter of law that the Agreement was simply a unilateral declaration based only on the language of the document.

Appellants also argue that the parties did not form a contract because the Agreement was not accompanied by a deed that actually transferred any property interest. But parties may enter into an enforceable contract to transfer property prior to actually transferring the property. Indeed, that occurs with most purchase and sale agreements, which typically require payment of the purchase price along with delivery of a deed at some future time. (See *Patel, supra,* 45 Cal.4th at p. 351.)

Similarly, Appellants argue that the absence of any express obligation for Franco to provide a deed means that the Agreement lacked consideration. However, " '[a]n agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding.' [Citation.] . . . 'In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, *furnishing deeds*, title insurance policies, prorating of taxes, and the like.' " (*Patel, supra,* 45 Cal.4th at p. 349, quoting *King, supra,* 32 Cal.2d at pp. 588–589, italics added.)

The Agreement clearly required that Franco was to provide certain property interests to the Aguados in return for their payment of the outstanding mortgage. The lack of detail in the Agreement concerning precisely how and when this was to be accomplished does not mean that the Agreement lacked consideration. "The fact that an agreement contemplates subsequent documentation does not invalidate the agreement if the parties have agreed to its existing terms." (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 624, fn. 3.)

The absence of detail also does not mean that the Agreement was too uncertain to be specifically enforced, as Appellants suggest.[1] As our Supreme Court explained in *Patel,* " ' " '[t]he law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if [they] can be ascertained.' " ' " (*Patel, supra,* 45 Cal.4th at p. 349, quoting *McIllmoil v. Frawley Motor Co.* (1923) 190 Cal. 546, 549.) In *Patel*, the court held that a contract that provided an option to purchase a condominium for a particular price over a specified period was sufficiently certain to enforce, even though the contract did not contain any other details of the purchase transaction. Similarly, here, the Agreement was sufficiently specific in identifying the material terms of the transaction even though it did not explain how the property interests at issue were to be transferred.

b. *Appellants are precluded from raising their fact-based arguments on appeal*

Appellants' remaining arguments depend upon disputed facts. For example, Appellants argue that Franco's " 'outward manifestations,' " including the deed he provided to Mendoza, show that he never intended the Aguados to obtain title to the property. Appellants also apparently contend that the Aguados's

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[1] "Whether a contract is certain enough to be enforced is a question of law for the court." (*Patel, supra,* 45 Cal.4th at p. 348, fn. 1.)

failure to obtain a deed from Franco shows that they did not intend the Agreement to create enforceable obligations.[2]

These arguments involve consideration of facts outside the words of the Agreement. At best for Appellants, deciding whether Franco's purported transfer of the Residence to Mendoza several years after signing the Agreement with the Aguados indicates a lack of intent to form a contract with the Aguados or simply a breach of that contract requires interpretation of the evidence.[3] Similarly, determining whether the Aguados's delay in obtaining a deed or other recordable document from Franco shows a lack of contractual intent requires weighing other extrinsic evidence supporting the conclusion that the parties did intend to form a binding contract. As mentioned, there was evidence at trial that: (1) the Aguados actually paid off the mortgage as provided in the Agreement; (2) the parties actually split the rent payments on the Residence as the Agreement required; and (3) the arrangement set forth in the Agreement was originally Franco's idea, which he repeatedly presented to the Aguados before the parties finally

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[2] Appellants place great reliance on the Aguados's delay in attempting to obtain a deed or other recordable record from Franco reflecting the Aguados's interest in the Residence. The legal significance that Appellants attach to the delay is unclear. Appellants made, and lost, a laches argument below, and do not raise that argument on appeal. We therefore understand Appellants' argument to relate to their contention that no contract was formed.

[3] "[F]ew contracts would be enforceable if the existence of subsequent disputes were taken as evidence that an agreement was never reached." (*Patel, supra,* 45 Cal.4th at p. 352.)

executed the Agreement. As discussed above, the interpretation of such evidence concerning disputed facts is for the trial court. We may not consider Appellants' factual arguments for the first time on appeal.

2. The Agreement's Provision Addressing Franco's Will Does Not Make the Agreement Unenforceable

Appellants argue that the provision of the Agreement stating that it "will dissolve any previous wills or testaments" is an improper codicil to Franco's will that makes the Agreement unenforceable on public policy grounds. Like Appellants' contract formation arguments, Appellants did not make this argument below.

We may not interpret the parties' intent with respect to this provision for the first time on appeal. At a minimum, the meaning of this provision is ambiguous.[4] From the face of the Agreement it is not clear that the parties intended this provision to alter Franco's will itself, or whether they simply intended to impose an obligation on Franco to revise any existing bequests he might have made that were inconsistent with the Agreement. The provision refers to "*any* previous wills or testaments." (Italics added.) There is no indication in the Agreement that the parties had a particular will in mind.

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[4] Although the interpretation of disputed extraneous evidence is a question of fact, the threshold issue of whether the language of a contract is ambiguous is a legal issue for the court. (*Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521.)

There is not even evidence in the record as to whether Franco actually had a will. Louis's testimony supports the conclusion that the disputed provision simply reflects a general intent to ensure that Franco would not attempt to leave the Residence to anyone else. Louis testified that he put the provision in the Agreement because he had heard from Franco and Esther "many years ago that they wanted to give this house to somebody in Mexico." Louis explained, "I don't know who that person is, and I don't believe that there's any written agreement or anything, but I remember that and that's the reason why I put that there that if there was any other contract or whatever, it will dissolve it."

An agreement to make or alter a will is not inherently unlawful. (See Prob. Code, § 21700, subd. (a) [listing requirements for a "contract to make a will or devise or other instrument"]; *Estate of Brenzikofer* (1996) 49 Cal.App.4th 1461, 1467 [" 'under certain circumstances equity will give relief equivalent to specific performance by impressing a constructive trust upon the property which decedent had promised to leave to plaintiff' "], quoting *Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 130.) Neither is an agreement to transfer a real property interest upon death. (See Prob. Code, § 850, subd. (a)(2)(B) [establishing a procedure for specific enforcement of a written contract by a decedent "to convey real property . . . upon or after his or her death"].)

In any event, even if the Agreement's provision concerning "previous wills or testaments" was an unlawful effort to create a codicil, there is no basis to conclude that the entire Agreement is void. "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (Civ.

Code, § 1599.) Even if the parties intended the provision at issue to amend Franco's will, that provision would not affect the remaining contractual commitments. The portions of the Agreement providing that the Aguados would become half owners of the Residence upon paying off the mortgage and sole owners following Franco's death are separate and enforceable.

3. The Aguados May Enforce Their Contractual Rights Despite Any Community Property Interest that Mendoza May Have in the Residence

Appellants argue that Mendoza has a community property interest in the Residence that takes precedence over the Aguados's contractual rights. Appellants are wrong.

Even if Mendoza acquired some community property interest in the appreciation in value of the Residence (if any) following her marriage to Franco, that interest is subject to contractual obligations that Franco incurred. Family Code section 910, subdivision (a) provides that "[e]xcept as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt." Family Code section 902 defines "debt" as "an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise." These two provisions combined mean that "the community is responsible for breaches of contract committed by either spouse." (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 685, citing *In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 622–626.) Thus, whether Mendoza has some community property interest in

the Residence is irrelevant to the Aguados's right to enforce their contract with Franco.

4. The Trial Court Acted Within Its Discretion in Granting Specific Performance of the Agreement

Appellants claim that the trial court erred in granting specific performance of the Agreement because the equities weigh against that remedy. Appellants argue that the Agreement is unfair to Franco and his heirs and that Franco did not receive sufficient consideration for giving up his ownership interest in the Residence upon his death.[5] We review the trial court's decision to grant specific performance under the abuse of discretion standard. (*Petersen v. Hartell* (1985) 40 Cal.3d 102, 110.)

Appellants did not argue below that the Agreement is unfair to Franco. The only equitable defense that Appellants raised below was that the Aguados waited too long to enforce their rights. The trial court rejected that argument, and Appellants do not renew it on appeal.

It is for the trial court to determine whether the consideration was adequate and the contract fair based upon the evidence at trial. (*Haddock v. Knapp* (1915) 171 Cal. 59, 62;

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[5] Civil Code section 3391 provides that "[s]pecific performance cannot be enforced against a party to a contract" if the party has "not received an adequate consideration for the contract" or the contract "is not, as to him, just and reasonable." (Civ. Code, § 3391, subds. (1) & (2).) The equitable defenses of laches and unclean hands may also prevent enforcement. (*MacFadden v. Walker* (1971) 5 Cal.3d 809, 815.)

Westwood Temple v. Emanuel Center (1950) 98 Cal.App.2d 755, 758.) These are not purely legal issues that we may consider for the first time on appeal.

In any event, there is sufficient evidence to support the trial court's decision to order specific performance. In return for his agreement to give up half of his interest in the Residence while alive and all of his interest upon his death, Franco received: (1) a lifetime right to live in the residence free of rent or mortgage payments; (2) the right to receive half the rental payments from the rental portion of the Residence (which the Aguados had arranged to add); and (3) relief from the obligation to obtain a new mortgage on the Residence, which Franco had agreed to do but never did.

Appellants argue that the Agreement deprives Franco of the right to leave the Residence to his heirs, but the record does not contain any evidence concerning Franco's intentions with respect to his heirs (other than the Aguados) when he entered into the Agreement. The Agreement was executed several years before Franco's marriage to Mendoza. " 'The proper time for testing the adequacy of consideration is as of the formation of the contract.' " (*Meyer, supra,* 55 Cal.App.3d at p. 945, quoting *Henderson v. Fisher* (1965) 236 Cal.App.2d 468, 474.)

Franco agreed to give up any ability to pass on the Residence to his heirs when he entered into the Agreement. We cannot say as a matter of law on this record that it was unreasonable for him to do so.

DISPOSITION

The judgment is affirmed. Respondents Doris and Louis Aguado are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.